

HON. RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

COLUMBIA RIVERKEEPER,

Plaintiff,

v.

WESTERN FABRICATION CENTER,
LLC,

Defendant.

Case No. 3:15-cv-05271-RBL

CONSENT DECREE

I. STIPULATIONS

Plaintiff Columbia Riverkeeper sent a sixty-day notice of intent to sue letter to defendant Western Fabrication Center, LLC ("Western Fabrication") on or about February 9, 2015, and filed a complaint against Western Fabrication on April 28, 2015, which alleged violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, relating to discharges of stormwater from Western Fabrication's metal fabrication facility, located at or about 2203 Talley Way, Kelso, Washington

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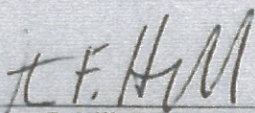
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SEATTLE, WASHINGTON 98112
(206) 860-2883

98626 (the "Facility"), and seeking declaratory and injunctive relief, civil penalties, and attorneys' and consultant's fees and costs.

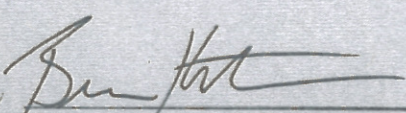
As a result of the notice of intent to sue letter and complaint, Western Fabrication has taken various actions to improve the quality of stormwater discharging from its Facility and to comply with the National Pollutant Discharge Elimination System ("NPDES") permit (No. WAR011442) authorizing discharges of pollutants from the Facility to the Coweeman River via the City of Kelso stormwater system and/or other conveyances.

Columbia Riverkeeper and Western Fabrication agree that settlement of this matter is in the best interest of the parties and the public, and that entry of this Consent Decree is the most appropriate means of resolving this matter.

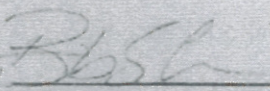
MILLER NASH GRAHAM & DUNN,
LLP

By 
Steven F. Hill, WSBA #23694
Attorneys for Defendant Western
Fabrication Center, LLC


SMITH & LOWNEY PLLC

By 
Brian A. Knutsen, WSBA #38806
Attorneys for Plaintiff Columbia Riverkeeper

WESTERN FABRICATION CENTER,
LLC

By 
Bob Schuening, General Manager
Western Fabrication Center, LLC

COLUMBIA RIVERKEEPER

By 
Brett Vandenhoevel, Executive Director,
Columbia Riverkeeper

Columbia Riverkeeper and Western Fabrication stipulate to the entry of this Consent Decree without trial, adjudication, or admission of any issues of fact or law regarding the claims

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1 and allegations set forth in Columbia Riverkeeper's complaint and sixty-day notice of intent to sue
2 letter.

3 II. ORDER AND DECREE

4 THIS MATTER came before the Court upon the foregoing stipulations of the parties.
5 Having considered the stipulations and the terms and conditions set forth below, the Court hereby
6 ORDERS, ADJUDGES, and DECREES as follows:
7

- 8 1. This Court has jurisdiction over the parties and subject matter of this action.
- 9 2. Each signatory for the parties certifies for that party that he or she is authorized to
10 enter into the agreements set forth below.
- 11 3. This Consent Decree applies to and binds the parties and their successors and
12 assigns.
- 13 4. This Consent Decree and any injunctive relief ordered within applies to Western
14 Fabrication's operation and oversight of the Facility, which is subject to NPDES Permit No.
15 WAR011442 (the "Permit"). This Consent Decree has no application with regard to any issue at
16 any other location where Western Fabrication may conduct operations.
- 17 5. This Consent Decree is a full and complete settlement and release of all claims in
18 the complaint, the sixty-day notice of intent to sue letter, and all other claims known or unknown
19 existing as of the date of entry of this Consent Decree, that could be asserted against Western
20 Fabrication or its employees, agents, successors, and assigns, under the Clean Water Act that arise
21 from operations at the Facility. These claims are released and dismissed with prejudice.
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1 6. This Consent Decree is a settlement of disputed facts and law, it is not an admission
2 or adjudication regarding any allegations by Columbia Riverkeeper in this case or of any fact or
3 conclusion of law related to those allegations.

4 7. Western Fabrication and Columbia Riverkeeper agree to the following terms and
5 conditions in full and complete satisfaction of all the claims covered by this Consent Decree:
6

7 a. Western Fabrication will comply fully with all conditions of the NPDES
8 Permit and any modified or replacement permit authorizing discharges of stormwater associated
9 with industrial activity from the Facility. Western Fabrication reserves all rights consistent with
10 the Permit to seek modification of the Permit, termination of the Permit, or any other change to
11 the Permit authorized by law.
12

13 b. Western Fabrication will sample stormwater pollution during at least two
14 (2) separate storm events at the following locations: Outfall 001, Outfall 002, Outfall 003, and
15 three (3) roof drains that drain to ground surface. Western Fabrication will analyze the samples
16 for the following parameters: total suspended solids ("TSS"), turbidity, pH, and total and dissolved
17 copper and zinc. Western Fabrication will also analyze samples from Outfalls 001 and 002 for
18 particle size distribution.
19

20 c. Western Fabrication will undertake a compliant Level Three Corrective
21 Action pursuant to Condition S8.D of the Permit.
22

23 (i) As part of the Level Three Corrective Action, Western Fabrication's
24 stormwater consultant shall complete a full analysis of the sources of stormwater
25 contamination at the Facility and what constitutes "all known, available and
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1 reasonable methods of prevention, control and treatment for those sources”
2 (hereafter “AKART analysis”). The Level Three Corrective Action, including the
3 AKART analysis, shall encompass the entire facility, including the recently
4 expanded operations.

5 (ii) The Level Three Corrective Action shall include an engineering
6 report that prescribes operational, structural, and treatment measures that are
7 sufficient, in the professional judgment of Western Fabrication’s stormwater
8 consultant, to achieve benchmarks in future stormwater discharges from the
9 Facility.
10

11 (1) Western Fabrication shall fully evaluate as part of the
12 engineering report whether it can eliminate all or some of its stormwater
13 discharges by constructing one (1) or more stormwater impoundments.
14 Columbia Riverkeeper would not oppose Western Fabrication terminating
15 Permit coverage if Western Fabrication eliminated its stormwater
16 discharges from the Facility.
17

18 (2) The engineering report shall be submitted to Columbia
19 Riverkeeper by September 30, 2015, unless Western Fabrication provides
20 notice to Columbia Riverkeeper no later than July 31, 2015, that there were
21 insufficient stormwater discharge events to collect at least two (2) samples
22 before July 31, 2015, in the manner described in paragraph 7.b of this
23 Consent Decree, and documentation demonstrating the lack of sufficient
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1 precipitation events during business hours, in which case the engineering
2 report shall be submitted to Columbia Riverkeeper by November 30, 2015.
3 Columbia Riverkeeper's stormwater consultant may, within thirty (30) days
4 of receipt of the engineering report, provide Western Fabrication comments
5 on the report. Western Fabrication will consider Columbia Riverkeeper's
6 stormwater consultant's comments in good faith and will revise the report
7 as Western Fabrication's stormwater consultant deems appropriate.
8 Western Fabrication shall prepare a final engineering report within sixty
9 (60) days of providing the draft report to Columbia Riverkeeper, with a copy
10 of the final report provided to Columbia Riverkeeper at that time. Within
11 sixty (60) days of completion of the final engineering report, Western
12 Fabrication shall make appropriate revisions to its SWPPP to incorporate
13 the additional operational, structural, and treatment measures prescribed in
14 the report as part of the Level Three Corrective Action.
15

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18 (3) Western Fabrication shall implement the measures described
19 in the final engineering report within ten (10) months of preparation of the
20 final engineering report. The parties may agree in writing to extend the ten
21 (10) month deadline if obtaining Washington Department of Ecology
22 ("Ecology") approval, procurement of construction material, obtaining
23 required permits, or other matters beyond the control of Western
24 Fabrication renders the ten (10) month deadline infeasible. Upon complete
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1 implementation of the measures described in the final engineering report,
2 Western Fabrication shall provide Columbia Riverkeeper written notice
3 thereof.

4 (iii) If not submitted by the date this Court enters the Consent Decree, Western
5 Fabrication will submit no later than thirty (30) days after entry of this Consent Decree an
6 application to Ecology for a Permit modification to cover its recently expanded operations
7 at the Facility onto adjacent property.
8

9 (iv) Western Fabrication shall prepare an updated Stormwater Pollution
10 Prevention Plan ("SWPPP") that complies with the requirements of the Permit.
11

12 (1) To the extent that Western Fabrication determines that any of its
13 discharge points are "substantially identical" with a sampling point such that
14 monitoring a discharge point is not required, the SWPPP will include
15 documentation supporting that determination as described in Conditions S3.B.5.b
16 and S4.B.2.c of the Permit.
17

18 (2) Western Fabrication shall complete the updated SWPPP no later
19 than sixty (60) days following entry of this Consent Decree, with a copy provided
20 to Columbia Riverkeeper at that time.
21

22 (3) Columbia Riverkeeper's stormwater consultant may provide
23 Western Fabrication comments on the updated SWPPP within thirty (30) days of
24 receipt of the SWPPP. Western Fabrication agrees to consider in good faith
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Columbia Riverkeeper's comments on the updated SWPPP and will revise the SWPPP as Western Fabrication's stormwater consultant deems appropriate.

d. Western Fabrication shall forward all documents concerning compliance with the Permit that Western Fabrication either submits to or receives from Ecology from the date of entry of this Consent Decree until such time as Western Fabrication completes every obligation imposed pursuant to paragraphs 7(b) and 7(c) of the Consent Decree. "Documents" include, but are not limited to, discharge monitoring reports, annual reports, correspondence, engineering reports, forms, and application materials (including Permit modification application materials).

8. Within seven (7) days of entry of this Consent Decree, Western Fabrication will pay the sum of FORTY THOUSAND DOLLARS (\$40,000.00) to the Rose Foundation for Communities and the Environment for a project or projects to improve or protect the water quality of the Columbia River as described in **Attachment A** to this Consent Decree. Columbia Riverkeeper will not seek nor receive any of these funds. Checks will be made to the order of and delivered to: The Rose Foundation for Communities and the Environment, attn: Tim Little, Executive Director, 1970 Broadway, Suite 600, Oakland, CA 94612. Payment will include the following reference in a cover letter or on the check: "Consent Decree, Columbia Riverkeeper v. Western Fabrication." Western Fabrication will, within fourteen (14) days of entry of this Consent Decree, provide a copy of the check and cover letter, if any, to Columbia Riverkeeper and its counsel at the addresses identified in paragraph 17, below.

9. Within seven (7) days of the later of the entry of this Consent Decree, Western Fabrication shall pay Columbia Riverkeeper TWENTY-FIVE THOUSAND DOLLARS

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1 (\$25,000.00) as full and final reimbursement for all litigation fees, expenses, and costs (including
2 reasonable attorneys' and consultant's fees) incurred in this matter by check payable and mailed
3 to Smith & Lowney, PLLC, 2317 East John St., Seattle, Washington 98112, attn: Brian A.
4 Knutsen. Western Fabrication's payment shall be in full and complete satisfaction of any claims
5 that Columbia Riverkeeper has or may have, either legal or equitable, and of any kind or nature
6 whatsoever, for fees (including attorneys' and consultant's fees), expenses, and costs incurred in
7 this matter.
8

9 10. In the case of a force majeure event, Western Fabrication will be given a reasonable
10 amount of time to perform tasks in paragraph 7 above. A force majeure event is any event outside
11 the reasonable control of Western Fabrication that causes a delay in performing tasks required by
12 this Consent Decree that cannot be cured by due diligence. Delay in performance of a task required
13 by this Consent Decree caused by a force majeure event is not a failure to comply with the terms
14 of this Consent Decree, provided that Western Fabrication notifies Columbia Riverkeeper of the
15 event. The notice will include a description of the event causing the delay; the steps that Western
16 Fabrication will take to respond to the event and perform the task; the projected time that will be
17 needed to complete the task; and the measures that have been taken or will be taken to avoid or
18 minimize any impacts to stormwater quality resulting from the event and the resulting delay in
19 completing the task. These notice provisions do not apply to extensions provided for in paragraphs
20 7.c.ii.2 and 7.c.ii.3.
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24 Western Fabrication will notify Columbia Riverkeeper of the occurrence of a force majeure
25 event as soon as reasonably possible but, in any case, no later than seven (7) business days after
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1 the occurrence of the event. In such event, the time for performance of the task will be extended
2 for a reasonable period of time following the force majeure event.

3 By way of example and not limitation, force majeure events include:

- 4 a. Acts of God, war, insurrection, or civil disturbance;
- 5 b. Earthquakes, landslides, fire, floods, drought;
- 6 c. Actions or inactions of third parties over which Western Fabrication has no
7 control;
- 8 d. Restraint by court order or order of public authority;
- 9 e. Strikes;
- 10 f. Litigation, arbitration, or mediation that causes delay.

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13 11. This Court retains jurisdiction over this matter and, while this decree remains in
14 force, this case may be reopened without filing fee so that the parties may apply to the Court for
15 any further order or relief that may be necessary regarding compliance with this Decree or to
16 resolve any dispute regarding the terms or conditions of this Decree until termination of the
17 Consent Decree as set forth in paragraph 13 below. A precondition to any application to the Court
18 under this paragraph is that the parties must first seek to resolve the dispute themselves as follows:

19 1) the party identifying or wishing to raise an issue or dispute must provide the other party's
20 counsel of record with a written notice detailing the nature of the issue or dispute; and 2) within
21 thirty (30) days of receipt of such notice the parties shall meet and confer regarding the issue or
22 dispute. If no resolution is reached at that meeting or within thirty (30) days of the written notice,
23 whichever occurs first, either party may file a motion with this Court to resolve the dispute. The
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1 provisions of section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), regarding awards of
2 costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or
3 substantially prevailing party, shall apply to any proceedings seeking to enforce the terms and
4 conditions of this Consent Decree.

5 12. The parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), no consent judgment
6 can be entered in a Clean Water Act suit in which the United States is not a party prior to 45 days
7 following the receipt of a copy of the proposed consent judgment by the U.S. Attorney General
8 and the Administrator of the U.S. Environmental Protection Agency ("U.S. EPA"). Therefore,
9 upon the filing of this Consent Decree by the parties, Columbia Riverkeeper will serve copies of
10 it upon the Administrator of the U.S. EPA and the U.S. Attorney General, with copy to Western
11 Fabrication.
12

13 14. This Consent Decree will take effect upon entry by this Court. It terminates ninety
14 (90) days after the parties' completion of all obligations imposed by this Decree. Western
15 Fabrication shall provide written notice to Columbia Riverkeeper of its completion of all
16 obligations within fourteen (14) days of that completion, and Columbia Riverkeeper will have
17 thirty (30) days to provide a written response should it dispute that Western Fabrication's
18 obligations are complete. In the event of a dispute over the completion of Western Fabrication's
19 obligations and the termination of this Decree, either party may resort to the dispute resolution
20 provisions of paragraph 11.
21

22 14. Both parties have participated in drafting this Consent Decree.
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1 15. This Consent Decree may be modified only upon the mutual agreement of the
2 parties and approval of the Court.

3 16. If for any reason the Court should decline to approve this Consent Decree in the
4 form presented, this Consent Decree is void. The parties agree to continue negotiations in good
5 faith in an attempt to cure any objection raised by the Court to entry of this Consent Decree.
6

7 17. Notifications required by this Consent Decree must be in writing. The sending
8 party may use any of the following methods of delivery: (1) personal delivery; (2) registered or
9 certified mail, in each case return receipt requested and postage prepaid; (3) a nationally
10 recognized overnight courier, with all fees prepaid; or (4) e-mail. For a notice or other
11 communication regarding this decree to be valid, it must be delivered to the receiving party at the
12 one or more addresses listed below or to any other address designated by the receiving party in a
13 notice in accordance with this paragraph 17.
14

15 **if to Columbia Riverkeeper:**

16 Lauren Goldberg
17 Staff Attorney, Columbia Riverkeeper
18 111 Third St.
19 Hood River, OR 97031
 lauren@columbiariverkeeper.org

20 **and to:**

21 Brian A. Knutsen
22 Smith & Lowney, PLLC
23 2317 E. John St.
24 Seattle, WA 98112
 briank@igc.org

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if to Western Fabrication:

Bob Schuening
General Manager
Western Fabrication Center, LLC
700 Colorado St.
Kelso, WA 98626
bob@westernfab.com

and to:

Jeffrey C. Miller
Miller Nash Graham & Dunn, LLP
500 Broadway St., Suite 400
Vancouver, WA 98660
jeff.miller@millernash.com

18. A notice or other communication regarding this Consent Decree will be effective when received unless the notice or other communication is received after 5:00 p.m. on a business day, or on a day that is not a business day, then the notice will be deemed received at 9:00 a.m. on the next business day. A notice or other communication will be deemed to have been received:

(a) if it is delivered in person or sent by registered or certified mail or by nationally recognized overnight courier, upon receipt as indicated by the date on the signed receipt; or (b) if the receiving party rejects or otherwise refuses to accept it, or if it cannot be delivered because of a change in address for which no notice was given, then upon that rejection, refusal, or inability to deliver; or

(c) for notice provided via e-mail, upon receipt of a response by the party providing notice or other communication regarding this Consent Decree.

DATED this ____ day of _____ 2015,

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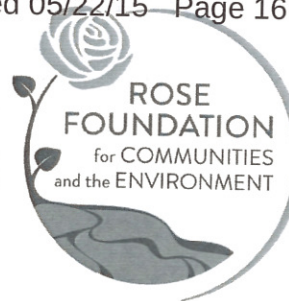
HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

CONSENT DECREE - 14
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(206) 860-2883

ATTACHMENT A

1970 BROADWAY, SUITE 600, OAKLAND, CA 94612-2218
ROSE@ROSEFDN.ORG



WWW.ROSEFDN.ORG

OFFICE: 510.658.0702
FAX: 510.658.0732

May 14, 2015

Thomas W. Swegle
Environment & Natural Resources Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, D.C. 20044-7415

Re: Columbia Riverkeeper v. Western Fabrication Center, LLC (Case No: 3:15-CV-05271-RBL)

Dear Mr. Swegle,

This letter is intended to provide assurance that I have received the proposed Consent Decree between Columbia Riverkeeper and Western Fabrication Center, LLC and that I am authorized by my Board of Directors to make the following binding commitments on behalf of the Rose Foundation.

- 1) I understand that the Rose Foundation should receive funds from Western Fabrication Center, LLC as specified in the Consent Decree.
- 2) The Rose Foundation shall only use these Western Fabrication Center, LLC funds for a project or projects to improve or protect the water quality of the Columbia River. Within that general nexus, the parties have expressed to the Rose Foundation that their intent in entrusting these funds to the Rose Foundation is that the monies should be focused exclusively towards protecting the water quality of the Lower Columbia River (below Bonneville Dam), and that none of the funds should be used for litigation. The Rose Foundation will honor these additional specifications by the parties.
- 3) After the funds have been disbursed, the Rose Foundation shall send a report to the Justice Department, the Court and the Parties describing how the funds were utilized and demonstrating conformance with the nexus of the Consent Decree.

Rose Foundation for Communities and the Environment

The Rose Foundation is a 501(c)(3) public charity (tax ID#94-3179772). Its mission is to support grassroots initiatives to inspire community action to protect the environment, consumers and public health. To fulfill this mission, the Rose Foundation conducts the following activities:

- Raise money to award as grants to qualified non-profit organizations conducting charitable operations. The Rose Foundation does not support lobbying activities that are prohibited by Section 501(c)(3) of the IRS Code, and none of the Western Fabrication Center funds shall be used to support political lobbying.

- Work directly in schools and in the community to encourage environmental stewardship and civic participation.
- Help government efforts to control pollution and protect the environment by encouraging community engagement in local, state and federal research and policy development.

Within this broad range of activities, all of the Rose Foundation's work revolves around one or more of the following strategic themes:

- Build and maintain a bridge between the community and organized philanthropy.
- Protect the natural environment, public health, and community and consumer rights.
- Promote collaboration between labor, environmental, business, consumer and social interests.
- Cultivate a new generation of environmental stewards and social policy leaders.
- Respect the inalienable rights protected by our nation's constitution, and the essential human rights to clean air, clean water, and individual dignity and privacy.

The Rose Foundation is governed by a Board of Directors. Grant applicants are required to submit written proposals, which must include at a minimum specific information about the goals, activities and projected outcomes of the proposed project, background about the charitable applicant, budget information, and a specific funding request. The Foundation may require additional information in order to fully evaluate the application. Applications are first screened by Foundation staff. Staff then makes recommendations to the Foundation Board for action. The Foundation requires all projects to submit written reports within one year of receipt of the grant award describing work conducted under the grant, thereby providing an accountability mechanism over funds awarded. Annual audits by the certified public accounting firm Levy and Powers are posted on the Foundation's website www.rosefdn.org.

I hope this provides you with the information you require. Please do not hesitate to contact me with any questions, or for additional information at (510) 658-0702 or tlittle@rosefdn.org.

Sincerely,



Tim Little, Executive Director

